

# Exhibit 140

*United States of America ex rel. Ven-a-Care of the Florida Keys, Inc. v. Boehringer Ingelheim Corp. et al.*

Civil Action No. 07-10248-PBS

Exhibit to the July 24, 2009, Declaration of James J. Fauci  
In Support of Plaintiff's Motion for Partial Summary Judgment and  
In Opposition to the Roxane Defendants' Motion For Partial Summary Judgment



*experience does matter*

**CASE: In Re: Pharmaceutical Industry Average Wholesale Price  
Litigation**

**DATE: December 5, 2007**

Enclosed is the Original of the transcript of the testimony of **Nancy-Ann Min DeParle** along with the errata sheet in the above-titled case. Please have the witness read the deposition and sign the signature page before a Notary Public.

After the signature page has been notarized, please return the original transcript and errata sheets to the custodial attorney within 30 days of receipt for proper filing.

Thank you for your attention to this matter and please feel free to contact us with any questions or concerns.

Sincerely,

Henderson Legal Services

Encl.

Henderson Legal Services  
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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

- - - - -  
IN RE: PHARMACEUTICAL ) MDL NO. 1456  
INDUSTRY AVERAGE WHOLESALE ) CIVIL ACTION  
PRICE LITIGATION ) 01-CV-12257-PBS  
THIS DOCUMENT RELATES TO )  
U.S. ex rel. Ven-a-Care of ) Judge Patti B. Saris  
the Florida Keys, Inc. )  
v. ) Chief Magistrate  
Abbott Laboratories, Inc., ) Judge Marianne B.  
No. 06-CV-11337-PBS ) Bowler  
- - - - -

(captions continue on following pages)

Videotaped deposition of NANCY-ANN MIN DEPARLE

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1 my desk looking at all these things. I don't  
2 recall knowing that some pay just one-tenth of  
3 the published price. So I'm sorry. I can't make  
4 that statement.

5 Q. You would agree with me that on January  
6 1, 1998 the agency issued a program memorandum  
7 that it felt faithfully executed the statutory  
8 command to it to pay based upon average wholesale  
9 price, correct?

10 MS. YAVELBERG: Objection, form.

11 A. Well, average wholesale price minus 5  
12 percent.

13 Q. Correct.

14 A. This was the new -- the law had been  
15 enacted which changed the payment formula from  
16 average wholesale price to 95 percent of average  
17 wholesale price. And that's what this January  
18 1998 program memorandum was trying to put into  
19 effect.

20 Q. And it was the agency's interpretation  
21 of that statute that Congress had required it to  
22 pay 95 percent of the average wholesale price

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1 even if the average wholesale price was ten times  
2 higher than the amount that an individual  
3 physician had purchased the drug for, correct?

4 MS. YAVELBERG: Objection, form.

5 A. I agree with the first part of your  
6 sentence. But the "even if," I don't think  
7 anyone was sitting there thinking about even if.  
8 The law said do this and that's what we were  
9 doing.

10 Q. And the fact that a physician's  
11 acquisition cost was greater, lesser or  
12 dramatically below average wholesale price had no  
13 effect on what your statutory obligation was to  
14 pay the AWP, right?

15 A. Now, that I agree with. I don't think  
16 we knew one aware or the other, greater, lower,  
17 different or the same. That's what the law said  
18 and that's what we were doing.

19 Q. And you would agree with me that if  
20 what President Clinton stated in his radio  
21 address was accurate that after January of 1998  
22 presumably at least one physician would submit a

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1 obligation to do that, but I believe the agency--  
2 but I would have wanted to do that and I believe  
3 the agency would have tried to do that.

4 Q. Do you know whether in any instance the  
5 agency either stopped payment for a claim or  
6 attempted to administratively recoup payment to a  
7 physician or a provider because the provider's  
8 acquisition cost was one-tenth of the submitted  
9 charge and 95 percent of the AWP?

10 A. I don't know.

11 Q. Would you expect that that occurred  
12 given Exhibit Abbott 202, the program memorandum,  
13 laying out the agency's policy?

14 MS. YAVELBERG: Objection, form.

15 A. I didn't know anything about claims pay  
16 payment one aware or the other, except in the  
17 broadest of terms that we had a billion claims a  
18 year. Those kind of abstract concepts. I don't  
19 know sitting here today anything more about the  
20 process than that.

21 Q. If the statutory command instead of  
22 being to pay average wholesale price had been to

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1 pay an actual average of prices in the  
2 marketplace, a mathematical average of prices in  
3 the marketplace, you would have expected Medicare  
4 carriers to pay lower payable amounts than they  
5 actually did pay under Balanced Budget Act of  
6 1997, correct?

7 MS. YAVELBERG: Objection to form.

8 MS. ALBEE: Objection to form.

9 A. Well, I think to answer that question  
10 you'd have to go back to what I thought average  
11 wholesale price was. And I did think that was a  
12 reference to the Ave. ranch wholesale prices in  
13 the marketplace. At the time this was enacted  
14 that's what I thought it was.

15 Q. You would agree with me that the Office  
16 of Inspector General report marked as Exhibit  
17 Abbott 002, or at least the 22 drugs representing  
18 67 percent of the Medicare Part B spend,  
19 indicated that for all of those drugs average  
20 wholesale price was not a mathematical average,  
21 correct?

22 MS. YAVELBERG: Objection, form.

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1 drug companies advised physicians.

2 Q. Okay. And were you aware, ma'am, that  
3 in their promotional materials to doctors that  
4 they were saying to doctors to bill at AWP even  
5 though the acquisition cost was far less than  
6 that?

7 MR. GORTNER: Objection, form.

8 MS. REID: Objection, form.

9 A. I have heard that since I was  
10 administrator, but at the time I was  
11 administrator, no, I did not know that.

12 Q. And to be clear, when you say since you  
13 were the administrator, at the time you were in  
14 charge of HCFA you did not know that?

15 A. No, I didn't.

16 Q. Okay. And are you aware if anyone at  
17 HCFA knew that?

18 MS. TORGERSON: Objection to form.

19 A. No.

20 Q. Okay. And you're also not aware, I  
21 take it, Ms. DeParle, that the drug companies  
22 were routinely creating spreads by which they